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NO. 54793-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FOXHOVEN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Michael Moynihan, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the record of ~~respondent/appellant~~ plaintiff containing a copy of the document to which this declaration is attached.

*Whatcom County Prosecutor*  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*P. Mayovsky*  
Name

*5-17-05*  
Date

Done in Seattle, WA

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A. ASSIGNMENT OF ERROR

The evidence of appellant's prior misconduct did not meet the stringent standard required to establish identity, and the court erred in admitting it for that purpose.

Issue pertaining to assignment of error

Appellant was charged with several counts of malicious mischief arising out of a rash of graffiti vandalism in Bellingham. The state had no evidence placing appellant in Bellingham at the relevant time or otherwise connecting him to the charged crimes. Instead, it rested its case on evidence that, several years earlier in California, appellant had done graffiti using one of the words that appeared in the Bellingham graffiti. Where the state failed to prove that the same highly distinctive modus operandi was used in appellant's prior crimes and in the charged offenses, did the trial court improperly admit the prior crimes evidence to establish appellant's identity as the perpetrator?

B. STATEMENT OF THE CASE

1. Procedural History

On November 20, 2002, the Whatcom County Prosecuting Attorney charged appellant Michael Foxhoven with seven counts of first degree malicious mischief, eight counts of second degree malicious mischief, and

four counts of third degree malicious mischief. CP 91-95; RCW 9A.48.070(1)(a); RCW 9A.48.080(1)(a); RCW 9A.48.090(1)(a). The case proceeded to jury trial before the Honorable Michael Moynihan.

The state filed an amended information after resting its case, charging Foxhoven with four counts of first degree malicious mischief and 11 counts of second degree malicious mischief. CP 28-31. The jury found Foxhoven guilty on all counts. CP 23-27. The court dismissed one count and lowered the degree on three others, to reflect the charges in the state's original information, and imposed standard range sentences. CP 3, 10. Foxhoven filed this timely appeal. CP 16.

## 2. Substantive Facts

On October 26, 2001, the owners of several businesses in downtown Bellingham discovered that, during the night, their shop windows had been vandalized with graffiti. 5RP<sup>1</sup> 318, 320-21, 357, 360, 363, 366, 370, 373, 376-77, 380-81, 383; 6RP 387, 390. In investigating these crimes, police found that all the graffiti had been applied using an acid etching compound.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP - 7/28/03; 2RP - 9/2/03 and 9/29/03; 3RP - 3/18/04; 4RP - 6/14/04 and 6/15/04; 5RP - 6/16/04 and 6/17/04; 6RP - 6/21/04; 7RP - 6/22/04; 8RP - 6/23/04; 9RP - 6/24/04, 6/25/05, and 8/19/04.

6RP 432. The graffiti consisted of the words GRAVE, HYMN, and SERIES. 6RP 433.

Officer Don Almer, the Bellingham Police Department's graffiti specialist, was assigned to investigate these crimes. 6RP 396, 431. In attempting to identify the vandals responsible for the graffiti, Almer contacted graffiti investigators at other local law enforcement agencies. 6RP 434. He received information that led him to suspect that Desmond Hansen was associated with the graffiti tag<sup>2</sup> GRAVE. 6RP 435. Almer obtained a search warrant for Hansen's residence. During the search, he found a large amount of graffiti-related items, including acid etching materials and other evidence relevant to the Bellingham investigation. 6RP 443; 8RP 763.

Next, Almer searched the home of Ben Amador, a high school student in Seattle who had been associated with the HYMN tag. 5RP 476. Among the graffiti-related materials located at Amador's residence, Almer found acid etching applicators. 6RP 485. Following the search, however, Almer no longer considered Amador a suspect in the Bellingham case. 6RP 486.

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<sup>2</sup> A tag is a moniker used by someone who does graffiti. 6RP 409.

Almer next obtained a warrant to search the residence of Luke Meighan and Reid Morris, two known Bellingham taggers, following up on a possible link between them and Hansen. 6RP 491-92. Police seized a substantial amount of graffiti-related material from that residence, including piece books<sup>3</sup> which contained the tags GRAVE, HYMN, and SERIES. 6RP 494-98, 504-10.

Some of the evidence obtained from the Meighan and Morris residence led Almer to suspect that Anthony Sanderson was associated with the HYMN tag, and he obtained a search warrant for Sanderson's residence in Seattle. 6RP 536. Almer found examples of the HYMN tag in Sanderson's bedroom and in digital photos on Sanderson's computer. 6RP 546-47. According to Almer, when he confronted Sanderson with this evidence, Sanderson admitted that he and Hansen were responsible for the Bellingham graffiti and that he uses the HYMN tag. 7RP 592-94.

Almer continued his investigation, searching for a suspect who might be associated with the SERIES tag. 7RP 597. Following a lead from someone caught tagging in a Seattle train yard, Almer called the Bay Area Rapid Transit Police Department to learn more about incidents of SERIES

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<sup>3</sup> Piece books are sketch books in which taggers practice their tags. Piece books are also passed around for other taggers to sign, like yearbooks. 6RP 453.

graffiti in the San Francisco area. As a result of that conversation, Almer focused his investigation on Michael Foxhoven, and he obtained a search warrant for Foxhoven's Seattle apartment. 7RP 597-99.

Unlike the other residences Almer had searched, Foxhoven's apartment was very neat and organized. 7RP 602; 8RP 780. At Amador's residence, for example, there was graffiti all over the walls, as if the room had been tagged. 5RP 310. By contrast, Foxhoven kept photographs of graffiti filed neatly in storage boxes and photo albums. 5RP 314.

In addition to the photographs, Almer located piece books containing SERIES, GRAVE, and HYMN tags and noted that SERIES was the predominant tag. 7RP 605-06, 612. He found videos and magazines about graffiti. 7RP 616. There was artwork hanging on the wall depicting the HYMN tag with the inscription "By Tony" and another canvas with SERIES 2002 written on the back. 7RP 619, 622. Among Foxhoven's photographs was a group of pictures of the SERIES tag on walls, dumpsters, trains, and a military helicopter. 7RP 633-40. There were also photographs showing Foxhoven with the SERIES tag. 7RP 643-45. In addition, digital images and a movie depicting the SERIES tag were found on Foxhoven's computer. 7RP 646. Although Almer found spray paint and paint pens, no acid

etching materials were found in Foxhoven's apartment. 5RP 311; 7RP 617, 621; 8RP 780.

Foxhoven called Almer following the search to discuss the investigation. When Almer explained that he suspected Foxhoven was involved in the Bellingham graffiti, Foxhoven denied the accusation. Foxhoven explained that he used to do SERIES tagging and was arrested for doing so in California, but he was no longer an active tagger. He had the materials in his apartment because he did graphic design, and the graffiti style was very popular. 7RP 649. Foxhoven said he knew Hansen and Sanderson but did not necessarily know them as the taggers GRAVE and HYMN. 7RP 652-53.

Following Almer's investigation, the state charged Hansen, Sanderson, and Foxhoven with separate counts of malicious mischief for each of the Bellingham businesses damaged by graffiti. CP 91-95. Hansen pled guilty, and Foxhoven and Sanderson proceeded to trial. 2RP 128.

Foxhoven's attorney moved in limine to preclude the state from introducing evidence of prior crimes, wrongs, or acts associated with Foxhoven. Specifically, counsel sought to suppress photographs of the SERIES tag seized from Foxhoven's apartment and testimony regarding Foxhoven's prior criminal conduct in California. CP 75; 4RP 160-65.

The state argued that evidence that Foxhoven had used the SERIES tag in the past was admissible to establish modus operandi, asserting these were "signature" crimes. 4RP 160. Counsel argued, however, that the state could not show that Foxhoven's past use of the SERIES tag was unique enough to establish identity in the charged offenses and therefore the highly prejudicial prior crimes evidence should be excluded under ER 404(b). 4RP 164-65.

The court denied the defense motion, ruling that the evidence was admissible because Foxhoven had admitted to Almer that he used the SERIES tag in California. 4RP 165-66, 231. The court did not address any of the ER 404(b) issues raised by the defense when making its ruling. See Id. At the sentencing hearing, the court signed an order indicating that the prior acts of graffiti vandalism were admitted to show a common scheme or plan or to establish modus operandi. The order also concludes that the probative value of the evidence was not outweighed by its prejudicial effect. Supp. CP \_\_\_ (Sub. No. 95b, Order Re: ER 404(b) Evidence, filed 8/19/04).

Sanderson also moved to exclude evidence of his prior acts, arguing that the evidence of past acts of graffiti did not rise to the level of modus operandi or identity evidence. 4RP 196. The court acknowledged the

substantial burden the state had to meet to establish identity through evidence of prior acts. It noted that the tags done in the past needed to be compared to the tags in the charged crimes, and if they appeared to be the same, they would come in. 4RP 202. Evidence of Sanderson's prior acts of graffiti was admitted without further ruling by the court. See 4RP 259-66.

In response to Sanderson's request, the court gave the following instruction regarding the ER 404(b) evidence:

[E]vidence . . . is being introduced at this time on the subject of the defendants' association with persons accused of graffiti vandalism or prior acts of graffiti vandalism for which they're not charged here today. This is being offered by the prosecution for the limited purposes of either modus operandi or common scheme, plan, or design. You're not to consider the evidence for any other purpose.

6RP 452.

At trial, Almer admitted that he had no facts connecting Foxhoven with the SERIES graffiti in Bellingham. In fact, in all the interviews and discussions he conducted during the course of his investigation, no one had ever told him that Foxhoven participated in the Bellingham graffiti. 8RP 787-88. Instead, the state's case against Foxhoven rested on Foxhoven's use of the SERIES tag in the past. The jury was shown the photographs

seized from Foxhoven's apartment to demonstrate his prior acts. 7RP 633-45.

In addition, Officer Henrick Bonafacio of the Bay Area Rapid Transit Police testified that, in 1997, he investigated several instances of the graffiti tag SERIES on airplanes, trains, and other property in the San Francisco area. 3RP 15. Foxhoven was the suspect for that vandalism. In a search of his residence, police found piece books, stickers with the SERIES tag, and a video showing Foxhoven spray-painting the SERIES tag on airplanes and trains. 3RP 17-18. Bonafacio also testified that his partner took a written confession from Foxhoven. 3RP 20-21.

Relying on evidence of Foxhoven's 1997 graffiti, as well as testimony about the "graffiti culture," the state sought to establish that SERIES was Foxhoven's tag and would not have been used by anyone else. See 6RP 402; 9RP 942, 1002.

Although the state's witnesses described a tag as a moniker used to identify a specific tagger, 6RP 409, Foxhoven established through cross examination that there are situations when taggers will write someone else's tag. Seattle Police Detective Rodney Hardin testified that sometimes a tagger will list a "roll call" of other members of his group. 5RP 286. He also explained that taggers will "hookup," which means writing someone

else's tag, giving recognition to a tagger who is not present when the graffiti is done. 5RP 287, 306. On cross examination, Officer Almer identified specific examples where other taggers had written the SERIES tag in piece books. 8RP 781-784. He also identified a photograph which depicted the HYMN, GRAVE and SERIES tags on a wall in Seattle, which were all written by Hansen. 8RP 784-85.

C. ARGUMENT

THE TRIAL COURT'S IMPROPER ADMISSION OF PROPENSITY EVIDENCE PREJUDICED THE DEFENSE, AND REVERSAL IS REQUIRED.

Evidence Rule 404(b) prohibits the admission of evidence to show the defendant has a criminal propensity. That rule states:

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The state has a substantial burden to meet when it attempts to introduce evidence of prior bad acts under one of the exceptions to this general prohibition. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The trial court must always begin with the presumption that evidence of prior bad acts is inadmissible. DeVincentis, 150 Wn.2d at 17.

"Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Thus, before admitting such evidence, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is to be introduced, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (3) weigh the probative value of the offered evidence against its prejudicial effect. In doubtful cases, the evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The appellate court reviews a decision to admit ER 404(b) evidence for an abuse of discretion. Thang, 145 Wn.2d at 642. The trial court abuses its discretion when exercising it on untenable grounds or for untenable reasons, or when no reasonable judge would have ruled as the trial judge did. Id.

In this case, the trial court ruled that evidence of Foxhoven's prior acts of graffiti was admissible because Foxhoven had admitted in his conversation with Officer Almer that he used to do graffiti and was arrested for tagging in California. 4RP 165-66, 231. While Foxhoven's admission

satisfies the first step of the required analysis, the fact that he admitted the prior misconduct is not alone enough to make evidence of that misconduct admissible. See State v. Thamert, 45 Wn. App. 143, 151 n.4, 723 P.2d 1204 (admission by party, while not hearsay under ER 801(d)(2), may still be excluded under ER 401, 403, or 404(b)), review denied, 107 Wn.2d 1014 (1986). The state still must prove, and the court still must find that the evidence is relevant for a legitimate purpose and not unfairly prejudicial. Id., at 151 (evidence or prior crime not properly admitted where court failed to balance probative value against prejudicial effect).

Despite the well-established procedure for admission of ER 404(b) evidence and counsel's argument that the evidence did not establish identity and was unfairly prejudicial, the court failed to analyze these remaining ER 404(b) issues at the time of its ruling. It simply ruled that any and all evidence involving Foxhoven's prior use of the SERIES tag was admissible because Foxhoven had admitted to Almer that he used to do graffiti using that tag.

In the limiting instruction it gave the jury, and in the written order entered at the sentencing hearing, the court indicated that the prior graffiti evidence was relevant to establish either a common scheme or plan or modus operandi. 6RP 452; Supp. CP \_\_ (sub no. 95b, supra) . Had the

court properly considered the restrictions of ER 404(b), however, it would have concluded that the state's evidence did not qualify under either of these exceptions.

There are two situations in which evidence of common scheme or plan may be relevant. The first is where multiple crimes constitute parts of a larger overall scheme, and the prior crimes are causally related to the charged crime. DeVincentis, 150 Wn.2d at 19. An example of this would be the prior theft of a tool or weapon used in a charged burglary. Id. This situation does not exist here. There was no evidence of a causal relationship between Foxhoven's prior use of the SERIES tag and the Bellingham graffiti.

The second type of common scheme or plan involves prior acts as evidence of a single plan to commit separate but very similar crimes. DeVincentis, 150 Wn.2d at 19. This type of plan is relevant when the issue is whether the charged crime occurred. Id. at 17-18, 20-21; Lough, 125 Wn.2d at 853. Again, since there was no dispute that the charged crimes occurred, this exception to ER 404(b) does not apply.

When the issue at trial is the identity of the perpetrator, rather than whether the crime occurred, evidence of a unique modus operandi is relevant. DeVincentis, 150 Wn.2d at 21. When identity is at issue,

however, the degree of similarity between the prior crimes and the charged offense must be at its highest level. Id. Evidence of other bad acts is relevant to the current charge only if the method employed in both crimes is so unique that proof that the defendant committed the prior crime creates a high probability that he also committed the charged crime. Thang, 145 Wn.2d at 643. The method used in committing the crimes must be so unusual and distinctive as to be like a signature. Id.

In Thang, the court noted that factors relevant to similarity include geographical proximity and commission of the crimes within a short time frame. 145 Wn.2d at 643-44. In that case, since the prior offense and the charged offense took place at least 18 months apart and at opposite ends of the state, the prior crime evidence lacked the geographic and temporal proximity necessary to establish identity. Id.

Other factors can be relevant to modus operandi as well. In State v. Russell<sup>4</sup>, the court held that evidence of separate murders was cross admissible to establish identity where each victim was killed by violent means, sexually assaulted, and then posed with props, and where the murders occurred within a few weeks of each other in a small geographic area. 125 Wn.2d at 68.

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<sup>4</sup> State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

In State v. Brown<sup>5</sup>, the court held that evidence of the defendant's prior thefts was admissible to establish his identity as the perpetrator of the charged thefts. There, in each of the defendant's prior crimes and the charged offenses, the thief approached the victim offering to sell salvaged televisions or video equipment, directed the victim to drive to a certain part of Seattle, took cash from the victim, left the victim waiting, did not return to the victim at that location, and contacted the victim a short time later. 782 P.2d at 1018. This method of committing the crimes was so distinctive that proof that the defendant committed the prior crimes created a high probability that he committed the charged offenses. Id.

And in State v. Laureano<sup>6</sup>, the court found a number of substantial similarities between a prior robbery and the charged offense, including temporal proximity, the manner of entry, the time of day, the number of perpetrators, and the use of a shotgun. 101 Wn.2d at 765. While recognizing that reasonable minds could differ as to whether these similarities established a distinctive modus operandi, the Supreme Court concluded that the trial court's admission of the prior crime evidence was not a manifest abuse of discretion. Id.

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<sup>5</sup> State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

<sup>6</sup> State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

Unlike these other cases, the evidence in this case failed to establish a distinctive modus operandi. The charged offenses all occurred in the downtown area of Bellingham, Washington, on the same night in October 2001. All the offenses involved acid etching on storefront windows. The graffiti included the use of three tags, and Foxhoven was charged with placing the SERIES tags. There was no evidence that Foxhoven had previously vandalized store windows, however. Instead, the state's evidence showed graffiti on posters, walls, trains, and a helicopter. See Exhibits 95-109. Nor was there any evidence that Foxhoven had done any acid etching in the past. All the prior acts relied on by the state involved spray paint. And the only specific information regarding the circumstances of Foxhoven's vandalism was that Foxhoven was connected with a large amount of SERIES graffiti in the San Francisco area in 1997. 3RP 15-16. Clearly this is not the close geographic and temporal proximity needed to establish identity. See Thang, 145 Wn.2d at 643-44.

If similarities are found between the prior acts and the charged offense, the next question is whether these similarities are unusual or distinctive. Thang, 145 Wn.2d at 644. The requirement that the evidence be distinctive or unusual ensures that it is relevant. State v. Coe, 101 Wn.2d 772, 777-78, 684 P.2d 668 (1984) (in rape case, despite some

similarities to actions of perpetrator, defendant's behavior in consensual sexual relationship not sufficiently unusual and distinctive to establish identity).

Here, the only similarity shown between Foxhoven's prior conduct and the charged offenses was the use of the word SERIES. The state argued below that a graffiti artist's tag is his identity and that the placement of that tag is a signature. It reasoned that Foxhoven's prior association with the SERIES tag necessarily established his identity as the perpetrator of the Bellingham offenses. 4RP 160-61, 198-99.

The evidence showed, however, that there are situations in which taggers will use someone else's tag, including to give recognition to a tagger who was not present at the time the graffiti was done. 5RP 286-87, 306. Moreover, there was evidence that Desmond Hansen, who admitted doing the Bellingham graffiti, had used the SERIES tag in prior graffiti. 8RP 784-85. Given this evidence, the mere presence of the SERIES tag is not so distinctive or unusual as to identify Foxhoven as the perpetrator.

The trial court suggested that the prior acts of graffiti would be relevant to prove identity if there was a similarity in appearance between the previous graffiti and the graffiti in the charged offenses. 4RP 202. Even if that single feature were enough to establish identity, it is not present

here. Not all the prior graffiti looks the same. For example, Exhibit 97 contains six photographs of the SERIES tag in various locations. One tag is done in simple capital letters, another is done in block letters with stars, a third has much larger block letters without stars, the fourth is slightly more stylized, and two more contain very elaborate block letters. It would be impossible to conclude, based solely on appearance, that all the previous graffiti was done by the same person, let alone that the same person must have done the Bellingham graffiti as well.

There was no legitimate reason to admit the prior misconduct evidence in this case. While the evidence certainly made it appear that Foxhoven had a propensity for unlawful graffiti using the SERIES tag, it did not satisfy the stringent standard necessary to establish his identity as the perpetrator of the charged offenses. The trial court failed to give thoughtful consideration to the relevant issues, and its admission of the prior crimes evidence was an abuse of discretion.

Not only was the court's admission of this evidence improper, but it was also highly prejudicial to the defense. When the trial court erroneously admits propensity evidence, the question on appeal is whether there is a reasonable probability that the outcome of the trial would have

been different but for the court's error. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

In Smith, the defendant was charged with three rapes, and the trial court improperly admitted evidence of three prior burglaries to establish his identity as the rapist. The Supreme Court held that admission of the prior crimes evidence was reversible error, noting that no one could positively identify the rapist, and testimony showed that the rapes could have been committed by different people. Under the circumstances, the erroneously admitted evidence could have materially affected the outcome of the trial. "Where identity of the accused is such a crucial issue, evidence of other unrelated crimes generates a good deal more heat than light, and may well be the basis upon which the jury convicts the accused." Smith, 106 Wn.2d at 780.

Here, as in Smith, no one identified Foxhoven as the perpetrator of the charged offenses. None of the business owners saw the vandals. 5RP 319, 321, 358, 361, 364, 375. There was no physical evidence placing Foxhoven at the scene. 8RP 809. And, while both Hansen and Sanderson admitted participating in the crimes, neither said that Foxhoven was present. 8RP 788. Moreover, Officer Almer admitted on cross examination that he had uncovered no facts connecting Foxhoven to the

Bellingham graffiti. 8RP 787-88. In fact, the state conceded that its entire case against Foxhoven rested on the prior crimes evidence. 4RP 199. Under the circumstances, there is no question that the outcome of the trial would have been different if the court had properly excluded the evidence of Foxhoven's prior graffiti. The trial court's improper admission of this highly prejudicial propensity evidence requires reversal.

D. CONCLUSION

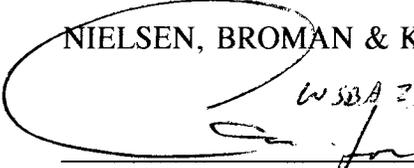
The evidence of Foxhoven's prior acts of graffiti served no legitimate purpose and was highly prejudicial to the defense. The trial court's erroneous admission of this evidence therefore requires reversal.

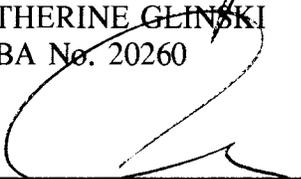
DATED this 17<sup>th</sup> day of May, 2005.

Respectfully submitted,

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